IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 203

ELI LILLY AND COMPANY,

Appellant,

v.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS

VINCENT P. BIUNNO,
WARREN E. DUNN,
605 Broad Street,
Newark 2, New Jersey.

LUM, FAIRLIE & FOSTER,
Of Counsel.

SAMUEL M. LANE,
CLAUS MOTULSKY,
26 Broadway,
New York 4, New York,
Attorneys for Sav-On-Drugs, Inc., Appellee.

CASEY, LANE & MITTENDORF,
Of Counsel.

VINCENT P. BIUNNO,
Counsel of Record.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 263

ELI LILLY AND COMPANY,

Appellant,

v.

SAV-ON-DRUGS, INC.,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW JERSEY

MOTION TO DISMISS

Appellee moves pursuant to Rule 16, Supreme Court Rules (28 U.S.C.) to dismiss the appeal herein on the grounds that the appeal does not present a substantial federal question and that the judgment rests on an adequate non-federal basis.

Appellant, an Indiana manufacturer of pharmaceuticals, sells its products to New Jersey wholesale druggists in interstate commerce. Appellant does not sell direct to New Jersey retail druggists.

Appellee operates two retail drug stores in New Jersey. Appellee buys nothing direct from appellant and has not signed appellant's fair trade contract. It gets its Lilly products from New Jersey wholesalers.

Appellant instituted this action to enjoin appellee from selling Lilly products below established fair trade prices. Upon motion, the trial court dismissed the complaint because appellant had not registered in New Jersey as a foreign corporation doing business in New Jersey pursuant to N.J. R.S. 14:15-3 to 5. The Supreme Court of New Jersey affirmed the trial court's judgment for the reasons stated in the lower court's opinion (J.S. p. 21; 23).

Appellant's Jurisdictional Statement seeks to convey the impression that its business activities in the State of New Jersey were exclusively in interstate commerce. This is in fact not the case, and appellant's assertion that the trial court conceded "that appellant's business was entirely in interstate commerce" (J.S. p. 5) is wholly unwarranted. The truth, as the record amply demonstrates, is that appellant is engaged in intrastate as well as interstate commerce.

Appellant sells its products to selected wholesalers in New Jersey "pursuant to distributor contracts made in the State of Indiana" (affidavit of Clutter). This is its interstate business.

Appellant's intrastate business in New Jersey is carried on by twenty employees: a district manager, secretary, and eighteen so-called "detail men". Their headquarters are in Newark, New Jersey, and all of them we believe are residents of New Jersey, two of them certainly are (affidavit of Herring), and their activities, as we shall show, are essentially local and intrastate.

The place where the district manager and secretary have their office and which serves as headquarters for the eighteen detail men who cover the State, is listed in the building directory and in the Newark telephone book under the name of Eli Lilly & Company (affidavit of Sirota, Opinion, J.S. p. 29). The lease is in the name

of the district manager, but it is appellant's name that is on the door and appellant reimburses the district manager for all expenses incidental to the maintenance and operation of the office (affidavit of Audino). The salaries of the secretary, the eighteen detail men, and, of course, the district manager, are paid by Lilly (affidavit by Audino). None are in any sense independent agents or contractors.

The function of the detail men is to promote *intrastate* sales of Lilly products. "They do not accept orders under any circumstances for the purchase of Eli Lilly & Company products" (affidavit of Audino). They will transmit orders to New Jersey wholesalers who can do what they please with them (affidavit of Audino). Apparently, they *never* transmit orders direct to the home office in Indiana.

The local sales are promoted by appellant's detail men by visits to retail pharmacists, physicians and hospitals, in the course of which (1) they describe the various Lilly products and urge that they be prescribed by the physicians, (2) they check up on "the stocks and inventory of the retailer to ascertain whether the retailer may be carrying a sufficient supply to meet potential demand"; (3) they recommend (as what salesman does not) "the enlargement of his available supply", (4) they transmit orders to the wholesalers, (5) they provide the retailer with advertising and promotional material (affidavit of Audino), (6) they urge pharmacists, physicians and hospitals to "order Lilly products from local wholesale distributors" (affidavit of Cluster), and (7) they police appellant's fair trade prices (affidavit of Herring; Complaint). Granted that the local sales that these men generate are, presumably, reflected by interstate sales to the local wholesalers, it is clear that their activities are studiously confined too intrastate sales promotion and service.

The significance of the foregoing facts was not lost on the trial court. After summarizing them (J.S. pp. 28-30) he said, "Despite the above recited facts, plaintiff insists that it is not doing business in New Jersey" (J.S. p 30), and then, after examining the authorities, went on to say "the conclusion is inescapable that the plaintiff was in fact doing business in this state at the time of the acts complained of" (J.S. p. 32).

It is settled law (and conceded by appellant (J.S. p. 11)) that a corporation organized in one state, which engages both in intrastate and interstate commerce in another state may be required to register pursuant to the laws of the latter prior to instituting a lawsuit in that state. *Railway Express Co.* v. *Virginia*, 282 U. S. 440 (1931), *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944).

In appellee's view, therefore, the decision below rests on an independent, non-federal basis. Moreover the record does not raise any federal question, let alone any substantial federal question.

Appellant *per contra* contends that New Jersey's foreign corporation registration law (N.J. R.S. 14:13-30-5), as interpreted by the courts below in this action, imposes an unreasonable burden on interstate commerce.

All that the New Jersey law requires of a foreign corporation doing business in the State is that it file with the Secretary of State a copy of its charter plus a statement describing its capital stock, the character of its business, its principal office in the State and the name and address of an agent to accept service of process. Upon compliance with the above, a certificate authorizing the corporation to do business must be issued as a matter of course. No discretion is vested in the Secretary of State to refuse it. (N.J. R.S. 14:15-3). Once the foreign corporation registers it may enforce a contract made

before registration. The foreign corporation may even register during the pendency of the suit and thereupon be permitted to continue the action. *Protective Finance Corp.* v. *Glass*, 100 N. J. L. 85, 125 Atl. 879 (Sup. Ct., 1924), *Day* v. *Stokes*, 97 N. J. Eq. 378, 127 Atl. 331 (E. & A., 1925).

A mere listing of the requirements of the statute which must be complied with prior to institution of an action by such a corporation indicates that we are not here dealing with an unreasonable burden on interstate commerce.

The most that can be said is that a foreign corporation doing business in New Jersey, such as Eli Lilly, is thereby (1) subjected to a minimal amount of paper work, and (2) obliged to designate an agent for service of process in the State. It is submitted that the designation of an agent for service of process can no longer be considered a significant burden on a corporation doing business in another state, in view of the fact that such corporation, even if it has only minimal contacts with such state, is in any event subject to suit therein regardless of whether or not it has designated an agent for service of process. *International Shoe Co.* v. *State of Washington*, 326 U. S. 310 (1945); *McGee* v. *International Life Insurance Co.*, 355 U. S. 220 (1957).

Balanced against this insignificant "burden" imposed on foreign corporations by the New Jersey registration requirement is the State's legitimate interest in insuring thereby (1) that its residents have an easy, certain and expeditious means of serving process on foreign corporations doing business in the State, and (2) that the corporation's presence in the State is brought to the State's attention so that compliance with its unemployment insurance, disability insurance, and workmen's compensation laws covering the corporation's local employees (appellant

has twenty such employees), as well as its tax and other laws may be assured.*

This Court, in *Union Brokerage Co.* v. *Jensen*, 322 U. S. 202 (1944), upheld a Minnesota foreign corporation registration requirement which was practically identical with the one here under review. In that case an unregistered foreign corporation was engaged in the customs brokerage business which, in the language of the Court "'aids in the collection of customs duties and facilitates the free flow of commerce between a foreign country and the United States'" (p. 209). The corporation was barred from maintaining an action against defendant for breach of his fiduciary obligations because of its failure to register in Minnesota.

Addressing itself to Union's claim that the registration requirement violated the Commerce Clause, the Court noted at the outset that:

> "It becomes necessary therefore to ascertain precisely what demand the State has here made, in relation to what transactions or activity it is making such demand, in what way federal authority has regulated such transactions or activity, and, finally, whether the Commerce Clause by its own force, in case federal law has not actually taken control, excludes the State from the exercise of the power it has here asserted." (p. 203)

The Court, after concluding that the State could properly legislate despite the presence of federal customs law, stated the crucial issue to be the effect of the registration statute on the Commerce Clause:

> "In a situation like the present, where an enterprise touches different and not common interests

* In this connection it may be observed that even a corporation whose sales within the state are made exclusively in interstate commerce may now be subjected to a fairly apportioned state income tax. *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U. S. 450 (1959).

> between Nation and State, our task is that of harmonizing these interests without sacrificing either." (pp. 207-208)

The Court then noted that although Union Brokerage's business was essentially interstate in character "the Commerce Clause does not cut the States off from all legislative relation to foreign and interstate commerce." (p. 209) Furthermore, the Court noted that Union Brokerage "has localized its business, and to function effectively it must have a wide variety of dealings with the people in the community." (p. 210) This is of course equally true, and in fact more so, in regard to Eli Lilly's business activities in New Jersey. Not only has Lilly localized its activities in the State by maintaining an office there, but as we have noted, practically all of the activities of Lilly's detail men were directed at promoting intrastate sales by New Jersey retailers and wholesalers.

Finally, the Court in *Union Brokerage* distinguished the line of cases led by *International Textbook Co.* v. *Pigg*, 217 U. S. 91 (1910), relied upon by appellant, on the ground that "we have not here a case of a foreign corporation merely coming into Minnesota to contribute to or to conclude a unitary interstate transaction." (p. 211). This is again equally true in the instant case with reference to Lilly activities in New Jersey.

All that the cases relied upon by appellant hold is that a foreign corporation engaged exclusively in interstate commerce "cannot be denied the right to sue, nor can conditions be imposed on the right to sue, on a cause of action *based on a transaction involving interstate commerce.*" 17 Fletcher, Corporations, §8424, p. 405 (Rev. Vol., 1960. Emphasis supplied). Furthermore, Fletcher significantly cites *Union Brokerage* v. *Jensen* for the proposition that "there are indications that inter-

state commerce may no longer serve as a barrier to qualification." Ibid., §8422, p. 387.

But regardless whether the older cases relied on by appellant are still good law today, they do not govern the case at bar. In none of them did the corporation concerned maintain an office in the foreign state nor had it otherwise localized its activities to any appreciable extent, and in each of them the barred action arose directly from the corporation's interstate activities.

International Textbook Co. v. *Pigg*, 217 U. S. 91 (1910), involved a suit by the Textbook Company for money due on a correspondence school contract solicited by an agent in Kansas and accepted in another state. It may be noted also that the foreign corporation registration requirement there involved was far more burdensome in that it required the listing of *all* shareholders of the foreign corporation and that, even after compliance therewith, authority to do business in Kansas could be withheld in the discretion of state officials if they determined that the corporation was financially insecure.

Buck Stove Co. v. *Vickers*, 226 U. S. 205 (1912), which involved the same Kansas registration statute, was decided merely by relying on the *International Textbook* case, and involved a foreign corporation doing "a purely interstate business." (p. 212)

Sioux Remedy Co. v. *Cope*, 235 U. S. 197 (1914), involved an Iowa registration statute which, unlike the New Jersey statute, barred all foreign corporations from suing in the State unless they complied with its registration requirements *regardless* of whether they were doing business in the State. Again, the suit attempted to be barred was on money due on the sale of goods solicited and shipped in interstate commerce.

Similarly, both *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U. S. 282 (1921) and *Furst* v. *Brewster*, 282 U. S. 493 (1931) involved lawsuits which arose directly from interstate commerce. In both cases plaintiffs sought enforcement of interstate contracts.

In the case at bar, as in *Union Brokerage*, the lawsuit, which was barred by reason of appellant's failure to register, did not arise out of appellant's transactions in interstate commerce. Conceivably a substantial federal question might have been presented if Eli Lilly had been barred from suing one of its New Jersey wholesalers for the sales price of the products sold to the latter in interstate commerce, but that is not the case.

In final analysis, appellant seeks to enforce in New Jersey courts a right secured by the New Jersey Fair Trade Law to protect the goodwill which it claims to enjoy in New Jersey as a result of its fixed price policy by enjoining a New Jersey retailer from selling Lilly products below the prices stipulated by appellant without, at the same time, recognizing any obligation to reveal its presence to the New Jersey authorities by registering with the Secretary of State as required by New Jersey law.

CONCLUSION

The appeal should be dismissed.

Respectfully submitted,

VINCENT P. BIUNNO,
WARREN E. DUNN,
605 Broad Street,
Newark, New Jersey,

LUM, FAIRLIE & FOSTER,
Of Counsel.

SAMUEL M. LANE,
CLAUS MOTULSKY,
26 Broadway,
New York, New York,
Attorneys for Sav-On-Drugs, Inc., Appellee.

CASEY, LANE & MITTENDORF,
Of Counsel.

VINCENT P. BIUNNO,
Counsel of Record.

August , 1960.